Supreme Court, U.S.
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No. 96-1258

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

ATLAS TURNER, INC.,

Petitioner

versus

HAROLD E. STRAUB and PAULINE STRAUB, husband and wife; BERNARD F. SIMBURGER and ROXIE L. SIMBURGER, husband and wife; and HELEN CONKWRIGHT, as surviving spouse of WILLIAM F. CONKWRIGHT, deceased, and on her own behalf,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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REASONS FOR GRANTING THE WRIT

THIS COURT HAS JURISDICTION TO CONSIDER THE QUESTIONS PRESENTED AND PETITIONER'S ARGUMENTS ON THOSE QUESTIONS

Petitioner Atlas Turner, Inc.[1] ("Atlas Turner") files this Reply Brief to address Respondents' argument that this Court lacks jurisdiction over this matter because the Petition for Writ of Certiorari ("Petition") was filed more than two years after the Ninth Circuit's decision, in 1994, in the first of two rounds of appeals involved in these cases. Respondents contend that this Petition should have been filed within ninety (90) days of the Ninth Circuit's first decision involving these matters.

Petitioner Atlas Turner contends that its Petition was timely filed, i.e., within ninety (90) days of the Ninth Circuit's second decision relating to these cases, issued on November 7, 1996 (Pet. App. 1a), and, therefore, Petitioner may raise in its Petition the validity of any previous decision, including the Ninth Circuit's 1994 rulings in these cases. As succinctly stated by the Seventh Circuit in *Air Line Pilots Association, International v. UAL Corporation,* 897 F.2d 1394, 1397 (7th Cir. 1990):

> A litigant in a federal case is not compelled to wait until the case is over before seeking certiorari, because it is not a requirement of certiorari to review an order of a federal court that the order be a final decision. 28 U.S.C. §§1254, 2101(e); S.Ct. R. 18. But the litigant is perfectly entitled to wait until the case is over, then appeal from the final judgment and raise on that appeal the validity of any previous orders that have not become moot in the interim. *Hughes Tool Co. v. Trans World Airlines, Inc.,* 409 U.S. 363, 365 n.1, 93 S.Ct. 647, 650 n.1, 34 L.Ed. 2d 577 (1973), . . .

Of course, the Seventh Circuit was following this Court's own decisions establishing its jurisdiction to consider federal questions decided in earlier stages of litigation:

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1. Pursuant to Supreme Court Rule 29.6, Atlas Turner, Inc. listed its related companies in its Petition for Writ of Certiorari at page iii. There are no amendments to that list.

> We now "consider all of the substantial federal questions determined in the earlier stages of the litigation ..." [citation omitted] for it is settled that we may consider questions raised on the first appeal as well as "those that were before the court of appeals upon the second appeal." [citations omitted]

Mercer v. Theriot, 377 U.S. 152, 153 (1964). *Mercer* was a wrongful death diversity action in which the judgment for plaintiff was reversed by the Fifth Circuit Court of Appeals for insufficient evidence and various trial errors. The Court of Appeals remanded the case for a determination of whether the plaintiff could justify a new trial. The Supreme Court denied a petition for a writ of certiorari. On remand, the District Court denied a motion for a new trial. The Fifth Circuit affirmed denial of the motion and the Supreme Court granted certiorari. The Supreme Court reversed, found the evidence sufficient, and remanded the case to the District Court with instructions to enter judgment on the jury verdict. In *Hughes Tool Company v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973) the trial court entered a default judgment in an antitrust action which was affirmed on appeal in 1964. The Supreme Court dismissed its writ as improvidently granted after the 1964 appeal. After the 1971 decision of the Court of Appeals, the Supreme Court granted certiorari and reversed and remanded the case with instructions to dismiss the action. In *Hanover Shoe, Inc. v. United Shoe Machinery Corporation,* 392 U.S. 481, 488 (1968), the trial court rejected the "passing on" defense in a treble damages antitrust case. The Court of Appeals affirmed and the Supreme Court denied certiorari. The subsequent trial resulted in a treble damages verdict which was affirmed in the second appeal. The Supreme Court affirmed rejection of the "passing on" defense after the second decision by the Court of Appeals.

In the first round of appeals in these cases, the Ninth Circuit held that Respondents were not required to serve their default judgments on Petitioner Atlas Turner, an instrumentality of a foreign sovereign, pursuant to 28 U.S.C. §1608(e) of the Foreign Sovereign Immunities Act ("FSIA"). The Ninth Circuit also held that Respondents did not have to strictly

comply with the service of process requirements of §1608(b) of the FSIA so long as Respondents proved Petitioner Atlas Turner had actual notice of the suits. (Pet. App. 15a.) The Ninth Circuit remanded the cases for determinations of whether Atlas Turner, Inc. had actual notice of the lawsuits. Thus, the 1994 judgments of the Ninth Circuit were not final. On remand, the District Court found that Atlas Turner had actual notice of the lawsuits. (Pet. App. 4a.) The Ninth Circuit upheld this determination in the second round of appeals (Pet. App. 1a.) The Ninth Circuit's decision in this second round of appeals does not render moot its decisions in the first round of appeals. As established by the cases cited above, this Court has jurisdiction to consider the questions raised in the first round of appeals.[2]

As to Respondents' assertions that Petitioner Atlas Turner has allegedly "made a practice of defaulting in virtually every lawsuit that has been filed against it since 1985" (Respondents' Brief at 14) and supposedly followed that alleged policy in these cases, these assertions are simply wrong and unfounded. Their sole purpose is to convince this Court, without any proof, that Petitioner has systematically disrespected the laws of this country and, therefore, is not entitled to the protections provided by the FSIA and other laws of this country. Such arguments fail to address the substantive issues raised in Atlas Turner's Petition. Atlas Turner respectfully submits that fair and consistent interpretation and application of the FSIA is an important question worthy of this Court's attention.

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2. Respondents' reliance on *Federal Trade Commission v. Minneapolis-Honeywell Regulator,* 344 U.S. 206 (1952) is misplaced because that case did not involve questions decided in an earlier appeal which were appealed to the Supreme Court after an intervening second appeal. Rather, the case involved a "final decree" of the Court of Appeals which repeated, without material change, the terms of its judgment which it had entered nine weeks earlier.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Fredric L. Goldfein

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